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SERVICE DATE - LATE RELEASE OCTOBER 18, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-581X

1411 CORPORATION—ABANDONMENT EXEMPTION—IN LANCASTER COUNTY, PA

STB Docket No. AB-529X

MIDDLETOWN & HUMMELSTOWN RAILROAD COMPANY—ABANDONMENT  
EXEMPTION—IN LANCASTER COUNTY, PA

IN THE MATTER OF A REQUEST TO SET TERMS AND CONDITIONS

Decided: October 17, 2001

BACKGROUND

By decision served on April 12, 2001, the 1411 Corporation and the Middletown & Hummelstown Railroad Company (collectively Applicants) were granted an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon service over a 2.5-mile line of railroad in Lancaster County, PA (line).<sup>1</sup> The exemption was scheduled to become effective on May 12, 2001, unless an offer of financial assistance (OFA) was submitted under 49 U.S.C. 10904 and 49 CFR 1152.27(c) by May 11, 2001. The effective date of the exemption was subsequently extended, by decisions served on May 8, 2001,<sup>2</sup> and May 10, 2001, in response to the filing by Frank Sahd Salvage Center, Inc. (Sahd) of a formal expression of intent to file an OFA.<sup>3</sup>

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<sup>1</sup> Due to the circumstances set out in the verified notices of exemption, both Applicants needed to seek authority to abandon the line.

<sup>2</sup> The May 8 decision also held in abeyance, pending completion of the OFA process, a request by Shawnee Run Greenway, Inc. (Shawnee) for issuance of a notice of interim trail use (NITU) and rail banking under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and a public use condition under 49 U.S.C. 10905.

<sup>3</sup> On July 5, 2001, Shawnee filed a motion for an exemption under 49 U.S.C. 10502 from 49 U.S.C. 10904 to terminate the OFA process in this case. On July 25, 2001, Sahd replied and also filed a motion to hold the procedural schedule in partial abeyance to permit the parties to negotiate a settlement. On July 27, 2001, Shawnee filed an opposition to Sahd's motion to hold  
(continued...)

On July 11, 2001, Sahd timely filed an OFA to purchase the line. By decision served on July 16, 2001, Sahd was found to be a financially responsible entity, and the effective date of the exemption was further postponed to permit the OFA process to proceed.<sup>4</sup>

On September 17, 2001, Sahd filed a timely request for the Board to set the terms and conditions for the sale of the line (Request) because the parties were unable to negotiate the sale price and other terms of sale for the line. Applicants filed a response to Sahd's request on September 24, 2001 (Response).<sup>5</sup> Sahd has offered to pay Applicants \$51,000 for the line. Sahd's offer reflects a price of \$40,000 for the underlying real estate and \$11,000 for the salvage value of the rail, ties, turnouts, and other track material (OTM) (rail assets). Applicants' declared minimum purchase price is \$118,150, which reflects a \$40,000 price for the underlying real

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<sup>3</sup>(...continued)

the procedural schedule in abeyance. On July 30, 2001, Sahd filed a request to modify its motion to hold the procedural schedule in partial abeyance. Also on July 30, 2001, Shawnee filed a motion to dismiss Sahd's OFA and a separate motion directed to Sahd's procedural schedule motion.

<sup>4</sup> The July 16 decision also set August 10, 2001, as the deadline by which Sahd or the Applicants could ask the Board to establish the terms and conditions for an involuntary sale under the OFA process. By decision served on August 3, 2001, the Board extended the date for filing requests to establish the terms and conditions for involuntary sale until 10 days after a ruling on Shawnee's request that the OFA process be terminated. By decision served on September 6, 2001, the Board denied Shawnee's motions to terminate the OFA process and to dismiss Sahd's OFA. Thus, the due date for filing a request to establish the terms and conditions for involuntary sale became September 17, 2001—10 days after the Board's September 6, 2001 decision was served.

<sup>5</sup> On September 26, 2001, Sahd filed a motion for leave to file a tendered reply to Applicants' response. Sahd maintains that Applicants' response includes new evidence, i.e., a signed contract that was presented by Applicants into the record and was not available to Sahd at the time it filed its request. Sahd's motion seeks an opportunity to respond to that new evidence and its uses by Applicants. On October 2, 2001, Applicants filed their opposition to Sahd's motion, arguing that Sahd's motion should be rejected or disregarded as improper. Although Sahd's motion is a reply to a reply, which is impermissible under our rules at 49 CFR 1104.13(c), we have discretion to accept such a pleading. We will grant Sahd's motion and allow Sahd to respond to the new evidence.

On October 3, 2001, Sahd filed a second motion for waiver of 49 CFR 1104.13(c) to file a rebuttal verified statement of Mr. Jeffrey O. Moreno, counsel to Sahd, to correct a purported factual inaccuracy contained in Applicants' opposition. The second motion does not add to our understanding of the issues, and its consideration would not alter the outcome in this proceeding. Sahd's second motion will be denied, and its verified statement will be rejected.

estate and a \$78,150 price for rail, ties, and OTM (rail assets), excluding nine turnouts that the Applicants would like to retain for use elsewhere on their rail system. See Verified Statement of Ronald George Sahd, Exhibit A, attached to the Request.

## TERMS AND CONDITIONS

### Valuation and Evidentiary Standards.

Requests for the Board to set conditions and compensation are governed by the provisions of 49 U.S.C. 10904(d)-(f). Under section 10904(f)(1)(B), we may not set a price that is below the fair market value of the line. Where, as here, there is no evidence of a higher going concern value for continued rail use, we set the price at the net liquidation value (NLV) of the rail properties for their highest and best nonrail use. Chicago and North Western Transp. Co.-- Abandonment, 363 I.C.C. 956, 958 (1981) (Lake Geneva Line), aff'd sub nom. Chicago and North Western Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982). NLV includes the value of the real estate plus the net salvage value of track and materials.

In proceedings to set conditions and compensation, the burden of proof is on the offeror, as the proponent of the requested relief. See Lake Geneva Line, 363 I.C.C. at 961.<sup>6</sup> Thus, in areas of disagreement, the offeror must present more detailed evidence or analysis or provide more reliable and verifiable documentation than that which is submitted by the carrier. Absent detailed evidence supporting the offeror's estimates and contradicting the rail carrier's estimates, we accept the carrier's estimates in a forced sale context. See Burlington Northern Railroad Company – Abandonment Exemption – in Sedgwick, Harvey and Reno Counties, KS, Docket No. AB-6 (Sub-No. 358X) (ICC served June 30, 1994), and cases cited therein.

Because the parties have presented their evidence by breaking out the proposed valuation for the underlying real estate and the rail assets, we will first set them out separately. However, the valuation that we ultimately accept is based on a sales contract that does not separate the two components.

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<sup>6</sup> Placing the burden of proof on the offeror is particularly appropriate in an OFA context, which involves an involuntary taking of property, because the offeror may withdraw its offer if it considers the price to be too high but the rail carrier must sell its line to the offeror at that price even if it considers the price to be too low.

Underlying Real Estate.

Applicants' \$40,000 valuation<sup>7</sup> for the underlying real estate was based on an executed option agreement to purchase the underlying real estate, dated September 7, 1999, between Applicants and Shawnee (Option Agreement).<sup>8</sup> See Request, Exhibit B. Sahd concurs in this \$40,000 real estate valuation as the result of an arm's-length negotiation.

We agree with Sahd that the executed Option Agreement provides a basis for, and is the best direct evidence of, the FMV of the underlying real estate. Indeed, a signed contract is often the best evidence of the value of property. See Portland Traction Company—Abandonment Exemption—in Multnomah and Clackamas Counties, OR, Docket No. AB-225 (Sub-No. 2X) (ICC served Jan. 10, 1990), slip op. at 5 (Portland); Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X) et al. (STB served Oct. 4, 2000), slip op. at 16.

Rail Assets.

Applicants' \$78,150 valuation of the rail assets was based on an offer from Shawnee (see supra note 2), dated June 27, 2001, to purchase all of the rails, switches, ties, and related apparatus of the line for \$80,000 (Purchase Offer).<sup>9</sup> See Request, Exhibit C. Sahd's \$11,000 valuation of the rail assets is substantially lower.

Sahd maintains that Applicants' valuation is unreliable and unconvincing, principally because Sahd views Shawnee's Purchase Offer as a poorly disguised and belated attempt to thwart Sahd's attempt to restore rail service to the line by artificially inflating the value of the rail

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<sup>7</sup> Applicants indirectly challenge their own submission by asserting that, in June 2001, they also furnished Sahd with what they describe as a copy of an independent real estate appraisal of the line, produced in March 2000, valuing the real estate at \$110,000. No copy of that appraisal was submitted into the record for review, however, and thus we can give it no credit.

<sup>8</sup> Shawnee entered into the Option Agreement for the purpose of "purchasing the property to facilitate its conversion to a hiking or biking trail pursuant to a process known as 'Rails to Trails.'" Response, Exhibit A.

<sup>9</sup> Applicants' valuation reflects a \$1,850 deduction for nine turnouts that they seek to exclude from the OFA sale for use elsewhere on their rail system.

assets.<sup>10</sup> Sahd notes that Shawnee did not make its Purchase Offer until it became aware of Sahd's intention to make an OFA, and Sahd alleges that Shawnee never intended to purchase the rail assets when it entered into the Option Agreement to purchase the underlying real estate. Rather, Sahd maintains that the Purchase Offer was presented on June 27, 2001, in response to Sahd's counsel's request for a definite price for the rail assets, and that the bona fides of the offer is undercut by the fact that the Purchase Offer has yet to be reduced to a final (signed and binding) agreement.

Sahd states that it hired RAILWORKS Track Services, Inc. (RAILWORKS) to conduct an on-site inspection of the line and prepare an estimate of the salvage value of the rail assets. RAILWORKS' July 9, 2001 estimate, on which Sahd based its value for the rail assets, indicates that the salvage value for the track, including parallel track and turnouts but excluding any material or work in the crossings, would be \$4,475. RAILWORKS' estimate also indicates that, in the event the ties could be left in place on the roadbed, the salvage value would be \$11,000.

Applicants respond that RAILWORKS' conclusory estimate of salvage value for the rail assets is inadequate. Applicants point out that RAILWORKS' estimate was a remarkably bare document—a mere four-line letter—and that Sahd provided no workpapers or other supporting data to support RAILWORKS' estimate, notwithstanding Applicants' request to Sahd to produce notes, workpapers, or other documents to support the appraisal. Accordingly, there is no basis upon which to test RAILWORKS' estimate.

Applicants maintain that Shawnee's Purchase Offer was not procured simply to defeat the Sahd OFA. They point out Shawnee's Purchase Offer was made on June 27, 2001, in advance of the OFA filing date of July 11, 2001, when Sahd first made known the amount of its own offer.<sup>11</sup> Applicants assert that the Shawnee Purchase Offer was a firm offer, that it was accepted verbally, and that the parties then proceeded to commence negotiation of an implementing agreement.

Finally, Applicants argue that their \$118,150 valuation is bolstered by a more recent arm's-length agreement to sell all of the property (the real estate and rail assets) to a third party for \$125,000. In particular, on September 17, 2001—the same day Sahd filed its request for us to set

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<sup>10</sup> Indeed, before it submitted Shawnee's Purchase Offer, Applicants had submitted from various salvage companies 3 quotations—which Sahd also challenges as deficient—ranging from \$30,000 to \$58,000 to acquire the rail assets.

<sup>11</sup> Sahd maintains that, although Applicants claim that they did not know what price Sahd intended to offer in its OFA, there had been on-going negotiation discussions between the parties and that Applicants could reasonably anticipate the level of Sahd's OFA.

terms and conditions—Applicants, Shawnee and Colonial Metals Co. (Colonial)<sup>12</sup> entered into a contract to transfer the line, including the underlying real estate and rail assets, for \$125,000 (Shawnee/Colonial Purchase Contract).<sup>13</sup> Applicants submit that, as indicated by the Shawnee/Colonial Purchase Contract, the line is worth more than the \$118,150 they had previously sought.

In its reply, Sahd argues that the Shawnee/Colonial Purchase Contract is simply a continuation of the numerous attempts to thwart Sahd's OFA, and is not competent evidence of fair market value.

#### Board Findings.

Sahd's sole basis for valuing the rail assets is the RAILWORKS' estimate. That estimate, however, provides no support for either the \$4,475 or \$11,000 figure. Thus, Sahd has failed to sustain its burden of supporting its proposed value of the line. That leaves us with the valuation evidence submitted by the Applicants. As explained in Portland (citations deleted), "The burden of proof standard requires that, absent probative evidence supporting the offeror's estimates, the rail carrier's evidence is accepted."

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<sup>12</sup> According to the verified statement of Mr. Phillip Serls, President of Colonial, Colonial has a steel fabricated building and vacant lot adjacent to the line. Colonial formerly used the line for its rail shipments. Mr. Serls states that Colonial recently agreed to participate with Shawnee to purchase the line for "rail-banking" purposes. Mr. Serls states that, with rail banking, where rails, ties and other track materials are removed, it would be considerably easier and less expensive for Colonial to pursue environmental testing of its property at the point where it abuts the line. Colonial states that it was in its own interest to participate in the purchase contract with Shawnee because it had negotiated a crossing of the line for easier access to its facility. This crossing, without the need to accommodate tracks, ties, and ballasts, Colonial states, would be in its current economic interest even though the line could later revert to rail use.

<sup>13</sup> According to Applicants, finalization of the contract was delayed due to various circumstances, including the extended vacations of Applicants' and Shawnee's counsels. Applicants state that they could not provide Sahd with a copy of the agreement because it was not finalized until September 17, 2001. Applicants maintain that they did not know whether or when Sahd might file its request for the Board to set terms until they actually received a copy of Sahd's request in the mid-afternoon on September 17, 2001. Applicants contend that the Board's September 6, 2001 decision led them to believe that Sahd's request would not be due until after October 6, 2001. In its reply, Sahd states that, in a teleconference on September 13, 2001, between Mr. Moreno and Mr. Stephen Kalish, who was temporarily acting as counsel for Applicants, Mr. Moreno informed Mr. Kalish that he interpreted the Board's September 6, 2001 decision as setting a September 17, 2001 date for filing Sahd's request for the Board to set terms.

The Applicants claim a value of \$120,000—consisting of \$40,000 for the underlying real estate, as to which both sides agree, and \$80,000 for the rail assets,<sup>14</sup> based on Shawnee's Purchase Offer. Sahd objects that that offer does not necessarily reflect an arm's-length determination of fair market value because Shawnee made its Purchase Offer after Sahd had invoked section 10904, and because Shawnee's Purchase Offer did not provide any source for the funds necessary to carry out the transaction and in any event was never finally executed. The Shawnee/Colonial Purchase Contract, however, does appear to have been formally executed by Shawnee and another business that has indicated some willingness and ability to provide at least part of the payment. Because it appears that the parties are bound to that contract, it represents the best evidence of record of the fair market value of the rail assets and related real estate. Accordingly, we must set the purchase price of the line at that \$125,000 level.<sup>15</sup>

If Sahd elects to proceed with the purchase at that price, (1) payment must be made by cash or certified check; (2) closing must occur within 90 days of the service date of this decision; (3) Applicants must convey all property by quitclaim deed; and (4) Applicants must deliver all releases from any mortgage within 90 days of closing.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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<sup>14</sup> The Applicants cannot choose to exclude the turnouts. Sahd has a statutory right to acquire all of the assets that are on this line. See Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X) (STB served Oct. 4, 2000), clarified (STB served Dec. 7, 2000), pet. for judicial review pending sub nom. Railroad Ventures, Inc. v. STB, No. 004303 (6th Cir. filed Oct. 19, 2000).

<sup>15</sup> There is not sufficient evidence on this record to substantiate Sahd's claim that the Shawnee/Colonial Purchase Contract is not bona fide, but rather simply an attempt to manipulate our processes to thwart the OFA sale (by having us set a price that is above fair market value). However, should Sahd decide not to purchase the line under the terms we establish here and should the sale not be timely completed under the Shawnee/Colonial Purchase Contract at the \$125,000 price contained therein, Sahd may seek to have this proceeding reopened on the ground that there has been a material misrepresentation and an abuse of our processes. We could then reopen the matter and set new terms for an OFA sale, if appropriate, under 49 U.S.C. 722(c).

It is ordered:

1. Sahd's motion for leave to file a reply is granted.
2. Sahd's motion for waiver to file a rebuttal verified statement is denied.
3. The purchase price for the line is set at \$125,000, and the parties must comply with the other terms of sale discussed above.
4. To accept the terms and conditions established here, Sahd must notify the Board and Applicants, in writing, on or before October 29, 2001.
5. If Sahd accepts the terms and conditions, Sahd and Applicants will be bound by this decision.
6. If Sahd withdraws its offer or does not accept the terms and conditions with a timely written notification, we will serve by November 7, 2001 a decision vacating the prior decision that postponed the effective date of the decision authorizing abandonment, subject to the terms and conditions of this decision.
7. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams  
Secretary